Nos. 17-1717, 18-18

In the Supreme Court of the United States

AMERICAN LEGION, *et al.*, *Petitioners*,

v.

AMERICAN HUMANIST ASSOCIATION, *et al.*

MARYLAND-NATIONAL CAPITAL PARK AND PLANNING COMMISSION, *Petitioner*,

v.

AMERICAN HUMANIST ASSOCIATION, *et al.*

On Writs of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF OF *AMICI CURIAE* RELIGIOUS DENOMINATIONS AND OTHER RELIGIOUS INSTITUTIONS SUPPORTING PETITIONERS

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QUESTION PRESENTED

This brief addresses the second question presented in No. 17-1717:

2. Whether the constitutionality of a passive display incorporating religious symbolism should be assessed under the tests articulated in *Lemon* v. *Kurtzman*, 403 U.S. 602 (1971), *Van Orden* v. *Perry*, 545 U.S. 677 (2005), *Town of Greece* v. *Galloway*, 572 U.S. 565 (2014), or some other test.

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INTRODUCTION AND INTERESTS OF *AMICI*[1]

This Court's interpretation of the Establishment Clause is of enormous importance for religious denominations and other faith groups. *Amici* are a diverse coalition of such groups, representing collectively more than 55 million Americans. *Amici* include the National Association of Evangelicals; The Church of Jesus Christ of Latter-day Saints; the Ethics and Religious Liberty Commission of the Southern Baptist Convention; The Orthodox Church in America; The Lutheran Church–Missouri Synod; International Church of the Foursquare Gospel; and Christian Legal Society. Despite disagreements on many points of faith, *Amici* are united in supporting religious freedom, which is seriously threatened by the Fourth Circuit's holding that a war memorial is unconstitutional merely because it takes the shape of a Christian cross.

Amici's interests in this case are two-fold. First, as this Court grapples with selecting a test or standard governing application of the Establishment Clause, *Amici* wish to ensure that the Court clearly understands how the various proposals would affect faith groups and their members. Some proposed tests—including the idea that coercion is required for an Establishment Clause violation—would deprive religious organizations and their members of important institutional protections grounded in the Clause's text and history. One such protection is the long-established doctrine that, even without coercion, courts and other governmental agencies cannot be arbiters of religious doctrine or practice.

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[1] No one other than *amici* and their counsel authored any part of this brief or contributed money to fund its preparation. Petitioners and Respondents filed blanket consents.

Second, *Amici* believe Establishment Clause law should be sufficiently clear and predictable that matters touching religion—including religious displays and religious exemptions from statutes—cease to be the subject of constant litigation. Widespread litigation over such matters produces unnecessary societal division, creating legal costs for religious organizations and attendant burdens on the Nation's courts—as well as a risk of decisions conveying judicial hostility rather than respect for religion. Open-ended or subjective legal standards adopted in prior cases deserve much of the blame for the explosion in Establishment Clause litigation over the past several decades.

As explained in detail below, the solution is not to adopt the atextual and ahistorical coercion test urged by petitioner American Legion, or the malleable multifactor test advanced by petitioner Maryland-National Capital Park and Planning Commission. The solution—for issues not already specifically resolved by binding precedent—is to embrace the Establishment Clause's text, as understood when it was adopted.

SUMMARY OF ARGUMENT

I. A plain reading of the text shows that the Establishment Clause erects a jurisdictional bar to laws "respecting an establishment of religion." For the founding generation, personal and historical experience invested this phrase with specific meaning. It included, most obviously, an official declaration that a particular church or religion was the preferred faith. Also embraced in that term were governmental intrusion into matters of church doctrine, governance, or personnel; compulsory participation in the rites and ceremonies of the established church; penalties on worship in dissenting churches or laws treating believers in those religions differently from believers in the established church; restrictions on political participation by religious dissenters; public financial support for the established church; and authorization for the established church to perform government functions.

Each of these attributes of an established church was not only likely to intrude upon the individual religious exercise of those who did not believe in the established religion, it also put the non-established faith communities at a substantial disadvantage. Thus, by prohibiting any law "respecting an establishment of religion," the First Amendment's Framers were protecting not just individual freedom, but non-established faith communities.

II. Most of the past and currently proposed legal standards for applying the Establishment Clause either misunderstand or ignore the Clause's text and history, and for that reason threaten religious freedom. That is true, for example, of the "coercion" test offered by petitioner American Legion. To be sure, that test reaches the correct result here. But in some circumstances, adoption of that test would undermine

the very freedom for religious institutions that the Clause was designed (in part) to protect: A statute authorizing a judge or other official to analyze religious texts to determine "the true Anglican doctrine" on a particular issue would be a flat violation of the Establishment Clause, even if the official's conclusion triggered no government compulsion. See, *e.g.*, *Mitchell* v. *Helms*, 530 U.S. 793, 828 (2000) (plurality opinion by Thomas, J.) ("It is well established *** that courts should refrain from trolling through a person's or institution's religious beliefs.").

The American Legion is also mistaken in suggesting that the framework articulated in *Lemon* v. *Kurtzman*, 403 U.S. 602 (1971), should be thrown out entirely. Some aspects of that framework—specifically, parts of its "entanglement" analysis—are compelled by the Establishment Clause's text and history and help protect the autonomy of religious institutions.

The American Legion is correct, however, in criticizing open-ended or subjective legal standards—such as the "endorsement" test and the generalized "purpose" and "effect" prongs of the *Lemon* test—as well as the plurality opinion and controlling concurrence in *Van Orden* v. *Perry*, 545 U.S. 677 (2005). None of those provides a sound general test for resolving Establishment Clause controversies, and none is consistent with the Clause's text and history.

III. The proper test is suggested in this Court's unanimous decision in *Hosanna-Tabor Evangelical Lutheran Church and School* v. *EEOC*, 565 U.S. 171 (2012), and the majority opinion in *Town of Greece* v. *Galloway*, 572 U.S. 565 (2014). Both decisions indicate that the meaning of the phrase "respecting an establishment of religion" should be discerned by looking to

historical practices and understandings at or near the founding period.

Thus, unless long-standing precedent already speaks definitively and consistently on a specific issue, see, *e.g.*, *Engel* v. *Vitale*, 370 U.S. 421 (1962) (state-composed public school prayer), application of the Establishment Clause should be driven by its text and what the founding generation understood it to mean. Specifically: *A government action should be sustained against an Establishment Clause challenge unless history confirms that the founding generation understood such an action as an establishment of religion outright*—such as the official formation of a national church—*or as a legal attribute of a religious establishment*—such as a law intruding into a church's ecclesiastical affairs.

Applying this test, Maryland's maintenance of the Bladensburg Cross does not remotely violate the Establishment Clause. Maintaining a nearly century-old war memorial at a busy intersection is hardly an official declaration *in law* that Christianity is the government's preferred religion. And the small financial cost of its maintenance—for the benefit of an organization that is not even a church—is a far cry from the public support for established churches during and preceding the founding era.

ARGUMENT

I. THE ESTABLISHMENT CLAUSE WAS ADOPTED TO PROTECT RELIGIOUS LIBERTY FOR INSTITUTIONS AS WELL AS INDIVIDUALS.

Like the Free Exercise Clause, the Establishment Clause exists to safeguard religious liberty for both individuals and religious institutions. See *Santa Fe Indep. Sch. Dist.* v. *Doe*, 530 U.S. 290, 313 (2000) ("[T]he common purpose of the Religion Clauses is to secure religious liberty.") (internal quotation marks omitted). See also Carl H. Esbeck, *Uses and Abuses of Textualism and Originalism in Establishment Clause Interpretation*, 2011 Utah L. Rev. 489, 494 (2011) ("Esbeck, *Uses and Abuses*") ("[T]he two clauses are complementary, each in its own way restraining the government and thereby working to enlarge religious freedom.").[2] A proper historical understanding of the text and original meaning of the Establishment Clause is necessary to formulate a test that upholds the Clause's vital role in protecting both individual and institutional religious freedom.

A. All the well-known features of religious "establishments" during the founding era undermined religious institutions as well as individual religious exercise.

The Clause directs that "Congress shall make no law respecting an establishment of religion." U.S.

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[2] Settled precedent establishes Respondents' standing to challenge the government's unwanted religious expression. See Carl H. Esbeck, *Unwanted Exposure to Religious Expression by Government: Standing and the Establishment Clause*, 7 Charleston L. Rev. 607, 616-37 (2013) (collecting 16 unwanted exposure cases, four of which take up the standing question).

Const. amend. I. Unlike other First Amendment clauses that prohibit infringing or abridging preexisting rights, the text reveals that the Establishment Clause acts as a jurisdictional bar preventing government from "mak[ing] a law respecting an establishment of religion." See Esbeck, *Uses and Abuses*, at 583-87. But what is the original meaning of "respecting an establishment of religion?"

Examining draft language that the first Federal Congress rejected shows that it sought to avoid extreme approaches to nonestablishment. On the unduly narrow side, the Senate ultimately rejected an early version that prohibited only a "law establishing one Religious Sect or Society in preference to others." *Id.* at 556 (quoting S. Journal, 1st Cong., 1st Sess. 116 (Sept. 3, 1789)). Likewise rejected was another narrow Senate provision excluding only laws "establishing articles of faith or a mode of worship." *Id.* at 559 (quoting S. Journal, 1st Cong., 1st Sess. 129 (Sept. 9, 1789)). Similarly, the House refused even to consider Elbridge Gerry's proposal to say only that "no religious *doctrines* shall be established by law." *Id.* at 539 (quoting 1 Annals of Cong. 757 (Aug. 15, 1789) (Joseph Gales ed., 1834)) (emphasis added). On the other hand, the House for a time embraced very broad language forbidding Congress from enacting "laws *touching* religion." *Id.* at 546 (quoting 1 Annals of Cong. 759 (Aug. 15, 1789)) (emphasis added). Congress rebuffed all these versions.

The final version—"no law respecting an establishment of religion"—was thus understood at ratification to mean more than just prohibiting Congress from legally establishing specific religious doctrines, articles of faith, or modes of worship, or legally preferring one religious group over others. Yet the Clause's history

also refutes a reading that government is barred from legislating on any subject "touching on religion," such as laws that protect or accommodate religious exercise. See Esbeck, *Uses and Abuses*, at 593–96.

By design, the Clause refers to "an establishment of religion"—a concept very familiar to 18th century Americans. They had experience, either directly or through their knowledge of history, with the character of established churches in England and Europe, and they knew well the religious establishments in the colonies and fledgling states. See Michael W. McConnell, *Establishment and Disestablishment at the Founding, Part I: Establishment of Religion*, 44 Wm. & Mary L. Rev. 2105, 2110–2130 (2003) ("McConnell"); Carl H. Esbeck, *Dissent and Disestablishment: The Church-State Settlement in the Early American Republic*, 2004 B.Y.U. L. Rev. 1385, 1395–1540 (2004) ("Esbeck, *Dissent and Disestablishment*"). They understood that an "establishment of religion" consisted of one or more of the following seven elements, each of which threatened non-established religious institutions in addition to individual religious exercise:

1. **A declaration in law that a particular church or religion is the official or preferred faith**

The founding generation understood well the most obvious establishment of religion: the recognition or designation in law of a jurisdiction's official or preferred church or religion. Stephanie H. Barclay, et al., *Original Meaning and the Establishment Clause: A Corpus Linguistic Analysis*, at 3, SSRN (Dec. 4, 2018)[3] ("Barclay") (finding "that by far the most common

[3] https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3295239.

characteristic discussed in the context of an establishment of religion involved legal or official designation of a specific church or faith"). For example, in 1692, after Maryland had served for a time as a haven for persecuted Catholics, the Maryland colonial assembly passed "an act making the Church of England the established church of the province."[4] During the Revolutionary War, South Carolina adopted a constitution that jettisoned the Anglican establishment and instead provided that "[t]he Christian Protestant religion shall be deemed and is hereby constituted and declared to be, the established religion of this State."[5]

Such statutory declarations—even without more—were an obvious threat to all non-established or, as they were sometimes called, "dissenting" churches or religions: Their members would have to worry about religious discrimination if they did such things as run for government office, participate in litigation, or face trial for an alleged crime. And even if it never materialized, the mere *potential* that their members might face such discrimination would discourage citizens from joining and/or participating actively in "dissenting" communities.

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[4] Esbeck, *Dissent and Disestablishment*, at 1487 n.350 (quoting 1 J. Thomas Scharf, History of Maryland: From the Earliest Period to the Present Day 343 (1967)).

[5] *Id.* at 1493 n.371 (quoting S.C. Const. of 1778, *reprinted in* 6 The Federal and State Constitutions, Colonial Charters, and Other Organic Laws of the States, Territories, and Colonies Now or Heretofore Forming the United States of America 3248, 3255-57 (Francis Newton Thorpe ed., 1909)).

2. Government intrusion into church doctrine, teaching, governance, and/or personnel

State establishments of religion also frequently involved governmental intrusion into or entanglement with ecclesiastical affairs. *Id.* at 2131. For example, establishing Anglicanism in England "led to all manner of state controls of the internal affairs of the established Church." John Witte Jr., God's Joust, God's Justice: Law and Religion in the Western Tradition 186 (2006). Acts of Parliament even set the established church's official doctrine and liturgy, such as the Book of Common Prayer. McConnell at 2132.

In the colonial establishments, Massachusetts enforced "Puritan orthodoxy" by "barr[ing] any person from public preaching without the approval of the elders of the four neighboring churches, or of the county court." *Id.* at 2135. Even after independence, as part of establishing the "Christian Protestant religion," South Carolina's 1778 constitution allowed a church to be considered part of the establishment only if it adopted five specific articles of faith. *Id.* at 2135-36. And in 1783, clergymen in Maryland's established church were obliged to seek "legislative approval of changes in the liturgy eliminating references to the king and making other changes 'to adapt the same to the Revolution.'" *Id.* at 2136.

Religious establishments also controlled the appointment and removal of ministers. See *id.* at 2136 ("The power to appoint and remove ministers and other church officials is the power to control the church."). So widespread was that aspect of religious establishments that in 18th century England, "the appointment of the ecclesiastical hierarchy became exceptionally political." *Id.* at 2136-37. And in colonial

New England, first the town, then later councils of neighboring churches, then courts had to approve a minister selected by the local congregation. *Id.* at 2137-38.

Control over appointment of ministers opened the door to government interference with church governance. When the royal governor of North Carolina maintained that only the Bishop of London could select ministers, the colonial Assembly passed laws allowing vestries to make such selections, only to have those laws rescinded by English authorities. See *Hosanna-Tabor*, 565 U.S. at 183. South Carolina's colonial government created "an ecclesiastical court" with power to "remove ministers 'for cause'—a flagrant violation of the Church of England's episcopal governing structure." McConnell at 2142 (footnote omitted). In Maryland, disciplinary authority over the established church's ministers was vested in the Assembly, "ma[king] day-to-day governance of the Church a political affair." *Ibid.*

Because of these colonial and founding-era intrusions, nonestablishment was widely understood to include the autonomy of churches to govern their ecclesiastical affairs free of government intrusion or entanglements. See, *e.g.*, *Watson* v. *Jones*, 80 U.S. (13 Wall.) 679, 727 (1872) (rejecting English law, which gave the state ultimate authority over ecclesiastical disputes, in favor of church autonomy over "questions of discipline, or of faith, or ecclesiastical rule, custom, or law").[6]

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[6] Accord *Kedroff* v. *St. Nicholas Cathedral of Russian Orthodox Church in N. Am.*, 344 U.S. 94, 116 (1952) (First Amendment gives religious organizations "independence from secular control

3. Compulsory attendance at and participation in the established church

Compulsory attendance or participation in religious services or ordinances was another common hallmark of religious establishments. In England and at least some American colonies (Virginia, Massachusetts, and Connecticut), missing Sunday worship in the established church resulted in fines and sometimes whippings. See McConnell at 2144–2146. Likewise, Baptist dissenters in New England were prosecuted for refusing to baptize their children in the established church. *Id.* at 2145.

Even where worship in dissenting churches was not prohibited, such laws obviously put those churches at a substantial disadvantage compared to the established church: While some believers in a non-established religion might be willing to attend services in both the established church *and* their preferred church, others might well lack the faith, character, time or means to worship twice over.

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or manipulation, *** power to decide for themselves, free from state interference, matters of church government as well as those faith and doctrine"); *NLRB* v. *Catholic Bishop of Chicago*, 440 U.S. 490, 502 (1979) ("very process of inquiry" into religiously sensitive matters can "impinge upon rights guaranteed by the Religion Clauses").

4. Prohibition on membership or worship in "dissenting" churches, or other conduct characteristic of believers in such communities

Under a religious establishment, moreover, dissenters were often punished as a means of coercing conformity. At one point, English penal statutes "inflict[ed] harsh sanctions on Catholics, Puritans, and others who attempted the open exercise of religious faith outside the official church." McConnell at 2160. While this eased in the wake of the Glorious Revolution as to various Protestant dissenters, matters worsened for Catholics who, in addition to the previous sanctions, "were barred from buying or inheriting land." *Id.* at 2161.

Some American colonies were more tolerant than England, while others continued such coercive practices. Massachusetts' early laws banished, imprisoned, fined, whipped, mutilated, and hung religious dissenters. *Id.* at 2162. In the early 1700s, Connecticut imposed "serious fines and penalties against dissenters." *Id.* at 2163. Virginia banned the "unreasonable and turbulent sort of people, commonly called Quakers." *Ibid.* (quoting 1 William Waller Hening, The Statutes at Large, Being a Collection of All the Laws in Virginia 532 (1823)). In 1756, the Virginia Assembly passed a law mandating that all "Papists" turn in their arms and ammunition. *Id.* at 2167. Not to be outdone, Georgia, South Carolina, and most of the New England colonies prohibited Catholic churches by law. *Id.* at 2166. And in Virginia, "Baptist ministers were still being horsewhipped and jailed as late as 1774 for preaching without a license." *Id.* at 2119.

A related feature of religious establishments that undermined non-established faith communities was laws prohibiting, on religious grounds, otherwise lawful conduct that would not have been engaged in by faithful members of the established church, but were common among "dissenters." For example, some jurisdictions enacted laws that prohibited working on Sunday—even within the confines of one's own property and without selling to the public—as a means of penalizing religious minorities and in the interest of promoting Christian piety. Jewish communities were especially hard-hit by laws prohibiting Sunday labor, which often used Christian terms such as "the Lord's Day" or "a Christian Society"—thereby expressly excluding Jews.[7]

5. Restriction of political participation to members of the established church

Dissenters from the established church would often lose other privileges, simply by virtue of their religious membership. In England, public office could be held only by those belonging to the Church of England, which included both active participation in Anglican communion and swearing an oath against the Catholic doctrine of transubstantiation. See McConnell at 2176. Additionally, Catholics for a time "were excluded from the militia." *Id.* at 2161.

In America, "[r]eligious restrictions on the right to vote were imposed in almost every colony." *Id.* at 2177. As a remnant of the old English establishment, "[e]ven

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[7] See, *e.g.*, 1797 Mass. Laws ch. 58; 1741 Acts of the North Carolina General Assembly, Ch. 14, 19; Archives of Maryland 418–420 (1696).

after Independence, every state other than Virginia restricted the right to hold office on religious grounds." *Id.* at 2178.

Here again, such restrictions put non-established churches at a significant disadvantage. Cf. *Torcaso* v. *Watkins*, 367 U.S. 488, 489 (1961) (voiding a Maryland constitutional provision requiring a notary public to sign "a declaration of belief in the existence of God"). Many believers in "dissenting" faith communities would not be willing to endure the social and economic costs imposed on those who refused to be members of an established church.

6. Public financial support for the established church

Disparities in public financial support also disadvantaged non-established faith groups. Religious establishments in England and the colonies often depended on government land grants (*i.e.*, "glebes") consisting of income-producing property. See McConnell at 2148. Parishes of the Church of England were also supported in part "by compulsory tithes," which "tithe payments constituted the majority of most ministers' incomes in the eighteenth century," and "were deeply resented by those who had to pay." *Id.* at 2147.

In New England, typically "each town [would] negotiate a salary with the minister, and *** impose the level of taxes necessary to comply with the contract." *Id.* at 2152. In Virginia, a vestry would calculate a tax based on the number of free males and enslaved persons older than sixteen and collect the annual tax pursuant to colonial authority. *Ibid.* Indeed, "all nine of the American colonies with established churches imposed compulsory taxes for the support of churches

and ministers." *Ibid.* And even during the Revolution, most states continued religious taxes in some form, with New England states continuing the practice beyond the war. *Id.* at 2157–2159.

Once again, such public financial support for the established church put non-established churches at a substantial disadvantage: While some believers in a non-established religion might be willing to endure the hardship of paying offerings to two different churches, others might well lack the faith or character to endure that hardship and could well abandon their non-established faith group as a result.

7. **Authorization for only the established church to perform governmental functions**

Another common element of an established church was a virtual monopoly over certain "important civil functions, especially social welfare functions." McConnell at 2169. This was common not only in England, but in all the southern American colonies. *Ibid.* Such functions included providing medical care, paying for the burial of the poor, and giving other forms of poor relief, funded (in part) by religious taxes. *Id.* at 2170–2171.

Similarly, in New England "clergy generally were charged with conducting or controlling the schools." *Id.* at 2172. In Virginia, the church rector was charged by law with keeping public records, such as births, marriages, and burials, and could be fined if he failed his duty. *Id.* at 2175. And in the Anglican colonies, only Anglican ministers were licensed to perform weddings. *Ibid.* Cf. *Larkin* v. *Grendel's Den*, 459 U.S. 116

(1982) (voiding statute granting church final and unreviewable authority to veto liquor license application).

Like the other well-known features of founding-era religious establishments, such restrictions discouraged citizens from joining or actively participating in non-established religions. A family considering becoming Baptists in colonial Virginia, for example, would think twice about that decision if one of its sons or daughters was planning a marriage.

In short, each of the common features of an "established" church at or before the founding was a threat not just to individual religious freedom, but to institutional freedom as well.

B. As originally understood, the Establishment Clause protected individual *and* institutional religious liberty.

The First Amendment reflects the Founders' insight that both free exercise and nonestablishment are essential to fully protect religious freedom—for both individuals and religious institutions.

For example, following its vote to ratify the Constitution, Maryland proposed a simple amendment underscoring the connection between disestablishment and individual religious liberty: "That there be no national religion established by law; but that all persons be equally entitled to protection in their religious liberty."[8] Many others criticized the original Constitution for its failure to include a provision expressly

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[8] The Complete Bill of Rights 12 (Neil H. Cogan ed., 2d ed 2015).

protecting individual conscience from religious establishments.[9]

Just as vitally, the original understanding of the Establishment Clause also protects religious organizations and communities.[10] Indeed, as previously explained, many of the specific features of religious establishments before the adoption of the First Amendment were a direct threat, not just to individual religious liberty, but to the health—and in some cases the existence—of non-established churches and faith groups.

By mandating institutional separation between church and state, state neutrality among religions, and governmental non-intrusion into ecclesiastical affairs, the Establishment Clause protects the self-governance and autonomy of religious organizations and faith communities. That autonomy is critical to religious freedom. Without it, religious organizations and faith communities cannot authentically define and preserve themselves. As Professor Esbeck has explained, "[r]eligious belief nearly always is expressed

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[9] See 2 The Debate on the Constitution 908 (Bernard Bailyn ed. 1993) (North Carolinian arguing that "no one particular religion should be established," so as to "secur[e] *** [the] unalienable right *** of worshipping God according to the dictates of conscience"); 2 The Debates in the Several State Conventions on the Adoption of the Federal Constitution 399 (Jonathan Elliot ed., William S. Hein & Co. 2d ed. 1996) (New Yorker lamenting the lack of a bill of rights "to have prevented the general government from tyrannizing over our consciences by a religious establishment"). See also Esbeck, *Uses and Abuses*, at 568.

[10] Carl H. Esbeck, *Establishment Clause Limits on Governmental Interference with Religious Organizations*, 41 Wash. & Lee L. Rev. 347, 351 (1984) (Establishment Clause analysis requires a court to take account of "the interests of religious organizations.").

in some sort of communal way," and religious organizations are thus uniquely "susceptible of harm to their essential religious character and mission if sullied by a government's heavy handedness." Esbeck, *Establishment Clause Limits*, *supra* n.10, at 374, 351. See also *Hosanna-Tabor*, 565 U.S. at 182-88, 196. In short, the Establishment Clause as originally understood serves as a bulwark against state incursions into the highly sensitive precincts of faith and religious community.

The result of this fundamental aspect of American religious freedom has been unprecedented religious pluralism—what Madison in the *Federalist* envisioned as a "multiplicity of sects."[11] Indeed, as Madison would later write, religion itself "flourishes in greater purity" under a regime of nonestablishment.[12]

Amici respectfully urge this Court, as it selects a legal standard to apply in Establishment Clause controversies, to respect the Founders' choice to protect religious liberty not only for individuals, but for religious institutions as well.

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[11] The Federalist No. 51 351–352 (Jacob E. Cooke ed., 1961). See also Esbeck, *Dissent and Disestablishment*, at 1385 ("The second expected benefit was that disestablishment would redound to the autonomy of the churches that, under the new settlement, had the freedom to succeed or fail by their own lights and by the appeal of their message.").

[12] *Letter from James Madison to Edward Livingston* (July 10, 1822), 3 Letters and Other Writings of James Madison, Fourth President of the United States 275–276 (1865).

II. THE "COERCION" TEST, *LEMON* AND *VAN ORDEN* ALL DEPART FROM CONSTITUTIONAL TEXT AND HISTORY, AND THREATEN THE RELIGIOUS FREEDOM OF INDIVIDUALS AND INSTITUTIONS.

The parties and their *amici* are likely to propose a variety of tests other than an historical approach. Many of these ahistorical or historically incomplete approaches—such as the coercion test, portions of the *Lemon* test, and the approaches articulated in *Van Orden*—ultimately harm religious liberty for both individuals and institutions.

A. Judged by the Establishment Clause's text and history, the "coercion" test is too narrow.

The test proposed by petitioner American Legion (at 24 – 40) exclusively examines whether the government action is coercive. But that test ignores the reality that, during and shortly after the founding, some government actions that would have been viewed as an establishment of religion were not necessarily coercive. See Barclay at 33, 37, 44 (finding individual coercion was an aspect of religious establishment *only* 8-35% of the time religious establishments were discussed in founding-era materials). And many of those were measures that intruded into the autonomy of religious institutions.

1. The most obvious example is the governmental selection of ministers discussed in *Hosanna-Tabor*. See 565 U.S. at 184–185. As this Court noted there, this was one of the central features of religious establishments both during the colonial period and earlier, in Europe and elsewhere. See *id.* at 182–183. Such

selections did not *necessarily* coerce violations of individual religious exercise because everyone in the religious body—from the highest pre-existing official to the newest congregant—could be perfectly happy with the government's choice, and with the government's making that choice.

But even without coercion, as *Hosanna-Tabor* recognized, "the Establishment Clause prevents the Government from appointing ministers." *Id.* at 184. Indeed, as explained above, selection of a minister by the government was at least an action "respecting" an "establishment of religion" in the sense that it was one of the common attributes of an established state church. See also *e.g.*, McConnell at 2110, 2113, 2136–2144. Accordingly, any reading of the Establishment Clause that *requires or is solely based on* government coercion of individual conscience is inconsistent not only with *Hosanna-Tabor*, but also with the history of religious establishments and, hence, with the Clause itself.

This principle of government noninterference in the choice of religious leaders, even where no coercion is involved, guided then Secretary of State James Madison to decline an invitation by the country's first Catholic bishop merely to offer official *advice* as to who should oversee the church's affairs in the territory encompassed by the Louisiana Purchase. See *Hosanna-Tabor*, 565 U.S. at 184 (citing Letter from James Madison to Bishop Carroll (Nov. 20, 1806), *reprinted in* 20 Records of the American Catholic Historical Society 63 (1909)).

2. Governmental second-guessing or even close analysis of religious disputes has likewise always been understood as an improper establishment, even when no coercion is involved. For example, in *Mitchell*, 530

U.S. at 804, this Court confronted a government program that determined eligibility for school grants based in part upon whether the school was "pervasively sectarian." Justice Thomas's plurality opinion—with no disagreement from others in the majority—noted that "the inquiry into the recipient's religious views required by a focus on whether a school is pervasively sectarian is *** offensive." *Id.* at 828. Further, "[i]t is well established, in numerous other contexts, that courts should refrain from trolling through a person's or institution's religious beliefs." *Ibid.* (citing *Employment Div.* v. *Smith*, 494 U.S. 872, 887 (1990)). As the above hypothetical involving "true Anglican doctrine" shows, such "trolling" is contrary to the Establishment Clause, whether or not it entails governmental compulsion.

Similarly, in *Watson*, 80 U.S. at 728, this Court refused to question the ecclesiastical judgments of a Presbyterian faction involved in a property dispute with another faction given our Nation's "broad and sound view of the relations of church and state under our system of laws," *Id.* at 727. But no state coercion to support or participate in religion was at stake. And if the Court had inquired into the ecclesiastical judgments of the Presbyterian adjudicatory, the result would have been a simple settlement of a private property dispute and would not have coerced individual conscience.

As explained above, however, one of the effects of disestablishment in the former American colonies was that the states, with or without coercion, could no longer decide matters of church doctrine, polity, or governance. The church autonomy doctrine—which bars courts and other government officials from intruding

into ecclesiastical matters—is thus rooted in the Establishment Clause. See, *e.g.*, *Jones* v. *Wolf*, 443 U.S. 595, 602 (1979); *Serbian Orthodox Diocese* v. *Milivojevich*, 426 U.S. 696, 709, 720 (1976).[13]

3. To be sure, legal coercion is *often* present in practices that the founding generation would have viewed as actions "respecting an establishment of religion." See *supra* I.A., McConnell at 2144–2146 (mandatory church attendance); *id.* at 2152–2159 (mandatory taxes); Esbeck, *Uses and Abuses* at 544; see also *Van Orden*, 545 U.S. at 693 (Thomas, J., concurring); *Elk Grove Unified School Dist.* v. *Newdow*, 542 U.S. 1, 52–53 (2004) (Thomas, J., concurring). And legal coercion may therefore be useful evidence to consider in determining whether a particular practice violates the Establishment Clause. Cf., *e.g.*, *Torcaso*, 367 U.S. at 496 (forced recitation of belief in God as a requirement to hold public office held unconstitutional). But if this Court is to remain true to the text and history of the Establishment Clause, it will eschew a test that makes coercion of individual conscience the sole measure of invalidity. After all, the Clause does not merely bar any "*coercive* law respecting an establishment of religion." It bars all such laws.

Indeed, this Court has already held that coercion is *not* essential to a valid Establishment Clause claim. See *Engel*, 370 U.S. at 430 ("The Establishment Clause, unlike the Free Exercise Clause, does not depend upon any showing of direct governmental compulsion and is violated by the enactment of laws which

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[13] Indeed, in 1811, James Madison vetoed a bill precisely because it would interfere with church polity, and therefore violate the Establishment Clause. See *Hosanna-Tabor*, 565 U.S. at 184–185; see also Esbeck, *Uses and Abuses*, at 617.

establish an official religion whether those laws operate directly to coerce nonobserving individuals or not."); *School Dist. of Abington* v. *Schempp*, 374 U.S. 203, 221 (1963). The Clause's original meaning supports that precedent.

B. While some aspects of *Lemon* promote religious liberty, others can generate judicial decisions seemingly hostile toward religion.

Some applications of *Lemon*'s entanglement test are also consistent with the original meaning of the Establishment Clause and serve to protect institutional religious liberty. But *Lemon*'s generalized secular purpose and effects tests are inconsistent with the Establishment Clause's text and history, and should be formally abandoned.

1. As originally articulated, *Lemon* instructed courts to consider (1) whether a law or policy has "a secular legislative purpose"; (2) whether "its principal or primary effect *** neither advances nor inhibits religion"; and (3) whether it "foster[s] an excessive government entanglement with religion." *Lemon*, 403 U.S. at 612–613 (internal quotation marks omitted). Later decisions combined the last two prongs, examining entanglement as part of the effects prong. See *Agostini* v. *Felton*, 521 U.S. 203, 233 (1997). But judges often use both the secular purpose and effects tests to find violations of the Establishment Clause unrelated to the provision's text and history.

The Eleventh Circuit's decision in *ACLU of Ga.* v. *Rabun Cty. Chamber of Commerce, Inc.*, 698 F.2d 1098 (11th Cir. 1983), illustrates why the *Lemon* "purpose test" should be formally interred. That decision erroneously held that, because a cross was erected "out of

religious stirrings and for a religious purpose," it *lacked* a secular purpose and thus violates the Establishment Clause. *Id.* at 1110. That holding was recently reaffirmed on *stare decisis* grounds. See *Kondrat'Yev* v. *City of Pensacola*, 903 F.3d 1169, 1173–1174 (11th Cir. 2018), *cert pending*, No. 18-351. These decisions ignore the text and original understanding of the Establishment Clause, which have nothing to do with striking down laws out of a concern with religious "stirrings."

Worse, the secular purpose test places religious legislators, voters, and citizens at a disadvantage compared to their secular peers. By prioritizing secular reasons over religious reasons, the secular purpose test chills religious speech and discourages the intermingling of religious and secular purposes, for fear that courts will rely on the former to invalidate the law. But this squarely contradicts founding-era traditions, which mixed secular and religious reasoning to achieve what the people at the time viewed as optimal policy outcomes.[14]

2. *Lemon*'s "effects" test is equally problematic. This inquiry not only has no basis in the text or history of the Establishment Clause, but it invites judges to attempt the difficult and speculative task of discerning causal links between the enactment of a law and real-world outcomes—thereby risking a perception (and occasionally a reality) of judicial hostility to religion.

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[14] See, *e.g.*, First Inaugural Address of James Madison (1809) (Madison intended to rely both on "well-tried intelligence and virtue of [his] fellow-citizens" *and* the "guidance of that Almighty Being whose power regulates the destiny of nations" in governing).

The decision below illustrates the point. As the panel admitted (at Pet. 16a–25a), the history of the cross at issue here is both secular and religious. To apply the effects test, then, the panel had to weigh the secular and religious effects of the cross. See Pet. 21a–27a; but see Pet 47a (Gregory, J., dissenting) (explaining how the governmental actions comply with *Lemon*'s effects test). Because every American has different experiences with religion, the effects test inevitably invites judges to rely upon their subjective views of religion to inform their opinions of the measure's effect—for example, what a "reasonable observer" would perceive when seeing the cross.

The same faults afflict the "endorsement" test applied in the concurring opinions of some members of this Court. That test, which asks "whether the government intends to convey a message of endorsement or disapproval of religion," *Lynch* v. *Donnelly*, 465 U.S. 668, 691 (1984) (O'Connor, J., *concurring*), inevitably produces outcomes based on judges' view of the proper role of religion in society. To some, even extending a religious accommodation "endorses" religion. To others, having the Ten Commandments on a classroom wall does *not* endorse religion. Like the effects test, the endorsement test invites subjective judicial impressions to dominate decision-making.

The effects test has also sometimes been used to strike down reasonable legislative exemptions. For example, the district court in *Corporation of the Presiding Bishop* v. *Amos* claimed that Title VII's religious exemption was unconstitutional because it had "the primary effect of advancing religion." 483 U.S. 327, 333 (1987). This Court unanimously reversed, noting that the government may decline to regulate, thereby permitting religious institutions to advance religion

without running afoul of the *Lemon* test. *Id.* at 337. But lower courts frequently sidestep *Amos* and hold that accommodations or exemptions granted to religious bodies or individuals nevertheless violate the Establishment Clause.[15]

To quote Justice Scalia, *Lemon*'s effects test is thus a "ghoul" that haunts religious organizations and people of faith seeking accommodations in a society filled with regulations. See *Lamb's Chapel* v. *Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384, 398 (1993) (Scalia, J., concurring in the judgment). As explained below, the most compelling way to correct this confusion is to abrogate that portion of *Lemon* in favor of the approach employed in *Hosanna-Tabor* and *Town of Greece*.

3. *Lemon*'s "entanglement" prong should also be modified, though not jettisoned entirely. Some applications of that analysis in the lower courts have invalidated government actions that plainly would *not* have been considered laws "respecting an establishment of religion" during the founding era. For example, in *Decker* v. *O'Donnell*, 661 F.2d 598, 610 (7th Cir. 1980), the Seventh Circuit invalidated on entanglement grounds portions of a federal job training law, merely because it allowed the use of government funds to hire teachers to teach remedial courses in sectarian schools. Similarly, in *Bell* v. *Little Axe Indep. Sch.*

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[15] See, *e.g.*, *Gaylor* v. *Mnuchin*, 278 F. Supp. 3d 1081, 1093 (W.D. Wis. 2017), *appeal pending*, Nos. 18-1277, 18-1280 (7th Cir.); *ACLU of Mass.* v. *Sebelius*, 821 F. Supp. 2d 474, 487 (D. Mass. 2012), *vacated on other grounds sub nom. ACLU of Mass.* v. *U.S. Conference of Catholic Bishops*, 705 F.3d 44 (1st Cir. 2013); *Dumont* v. *Lyon*, No. 17-cv-13080, 2018 WL 4385667, at *16–*21 (E.D. Mich. Sep. 14, 2018) (allegation that exemption advanced religion survived motion to dismiss).

Dist., 766 F.2d 1391, 1406–1407 (10th Cir. 1985), the Tenth Circuit invalidated on entanglement grounds a policy allowing religious clubs to meet on school property, simply because the policy required a teacher to monitor the club for immoral, violent or education-interfering conduct. Neither of these cases involved any of the seven attributes of religious establishments described above, and neither of the policies there posed any threat to religious institutional autonomy or individual religious exercise.

By contrast, other applications of the entanglement analysis have prevented the very kinds of intrusions into religious doctrine and practice that *were* frequently a part of religious establishments during the founding era. *Mitchell* v. *Helms*, 530 U.S at 804–807, 836, is a good example of a decision striking down governmental entanglement with the prerogatives of a religious institution. So too is *NLRB* v. *Catholic Bishop of Chicago*, 440 U.S. 490, 502-04 (1979), which recognized a religious school exemption to the National Labor Relations Act, in part because application of that law would require governmental inquiries into religiously sensitive matters. The Court held that the "very process of inquiry" into those matters could "impinge upon rights guaranteed by the" the Establishment Clause. *Id.* at 502 *accord, e.g., University of Great Falls* v. *NLRB*, 278 F.3d 1335, 1341–1343 (D.C. Cir. 2002) (similar).

C. *Van Orden* is too fact-specific and ahistorical to provide an adequate judicial test.

As an alternative to a coercion test or the *Lemon* test, petitioner Maryland-National Capital Park and Planning Commission suggests (at 23–44) that this

case could be resolved by examining the various opinions in *Van Orden*. But that would only heighten the confusion that has existed in Establishment Clause jurisprudence since *Lemon*. See, *e.g.*, *Utah Highway Patrol Ass'n* v. *Am. Atheists, Inc.*, 565 U.S. 994, 994 (2011) (Thomas, J., dissenting from the denial of certiorari) (noting lower courts need the guidance of this Court "to provide clarity to an Establishment Clause jurisprudence in shambles").

The *Van Orden* plurality opinion does not provide an adequate test because its holding is so specifically tied to the facts of that case. Relying on the precise nature of the monument displayed there—a specific Ten Commandments display—the plurality concluded that Moses' role as a lawgiver gave a religious display "an undeniable historical meaning," *id.* at 690 (plurality), in addition to its religious meaning. But the opinion did not articulate any general approach to resolving that or other Establishment Clause controversies. See *id.* at 692 (Scalia, J., concurring). It failed to engage the core question of what, exactly, is a "law respecting an establishment of religion" condemned by the Establishment Clause.

Nor does the controlling concurring opinion provide a suitable test. It merely identified certain "principles" that the First Amendment is said to pursue, among which are "seek[ing] to avoid that divisiveness based upon religion that promotes social conflict" and maintaining the "peaceful dominion that religion exercises." 545 U.S. at 698 (Breyer, J., concurring) (citation omitted). As a textual matter, this is untenable: The Framers of the First Amendment knew how to write a provision such as, "Congress shall make no law that increases religious strife." Instead, by picking specific

terms of art—such as "Establishment" and "Free Exercise"—the Framers provided concrete guideposts that both limit social strife and were reasonably well understood at the time. See Section I, *supra*; Michael W. McConnell, *Origins and Historical Understanding of Free Exercise of Religion*, 103 Harv. L. Rev. 1409 (1990).

Ultimately, like *Lemon* and the coercion test, *Van Orden* provides no reliable guide to resolving Establishment Clause disputes.

III. A JUDICIAL TEST GROUNDED IN CONSTITUTIONAL TEXT AND HISTORY SHOULD CONTROL THIS AND OTHER ESTABLISHMENT CLAUSE CASES.

The criticisms above explain how *not* to answer Question 2 of the petition in 17-1717. *Hosanna-Tabor* and *Town of Greece* offer a sounder interpretive approach.

A. *Hosanna-Tabor* and *Town of Greece* confirm that historical practices at the founding are the primary indicators of constitutional legitimacy for all Establishment Clause claims.

1. In *Town of Greece*, the Court rejected a claim that the practice of opening town board meetings with prayer violated the Establishment Clause. See 572 U.S. at 591–592. Rather than citing *Lemon* or some other formulation, the Court relied upon historical practice. As the Court noted, precedent teaches that generally "the Establishment Clause must be interpreted 'by reference to historical practices and understandings.'" *Id.* at 576 (quoting *Cty. of Allegheny* v. *Am. Civil Liberties Union, Greater Pittsburgh Chapter*, 492 U.S. 573, 670 (1989) (Kennedy, J., concurring in

the judgment in part and dissenting in part)). The Court rejected an approach treating legislative prayer as a permissible constitutional anomaly simply because of its long history. Rather, the Court declared that under the Establishment Clause, history is the primary indicator of constitutional legitimacy. By that understanding, "*[a]ny* test the Court adopts must acknowledge a practice that was accepted by the Framers and has withstood the critical scrutiny of time and political change." *Id.* at 577 (emphasis added).

The Court thus inquired "whether the prayer practice in the town of Greece fits within the tradition long followed in Congress and the state legislatures." *Ibid.* A review of history from the founding to the present demonstrated that "[f]rom the earliest days of the Nation, these invocations have been addressed to assemblies comprising many different creeds." *Id.* at 584. Because the prayers offered at board meetings in the Town of Greece were squarely within this tradition of voluntary legislative prayer, the Court held that they did not violate the First Amendment. See *Id.* at 591–592.

Writing for a plurality, moreover, Justice Kennedy rejected attempts to portray the town's practice as coercion merely because it offended some non-believers: "Offense *** does not equate to coercion." *Id.* at 589.[16]

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[16] Although only a plurality formally joined this portion of Justice Kennedy's opinion, Justices Thomas and Scalia endorsed the point that mere offense at the government's religious expression does not violate the Establishment Clause. See *Town of Greece*, 572 U.S. at 609–610 (Thomas, J., concurring in part and concurring in judgment).

Town of Greece is not alone in relying on history to adjudicate claims under the Establishment Clause. A unanimous Court in the landmark case of *Hosanna-Tabor* rejected the claim that federal and state law could require a religious school to reinstate a teacher with the title of "commissioned minister." See 565 U.S. at 196. The Court held instead that the Establishment Clause requires a "ministerial exception" to federal and state anti-discrimination laws. *Id.* at 188–189.

In reaching that conclusion, the Court canvassed centuries of history behind the practice of government regulation of religious offices—a practice the founding generation repudiated as an establishment of religion. "By forbidding the 'establishment of religion' and guaranteeing the 'free exercise thereof,' the Religion Clauses ensured that the new Federal Government—unlike the English Crown—would have no role in filling ecclesiastical offices." *Id.* at 184.

Town of Greece and *Hosanna-Tabor* are consistent with numerous other opinions by the Court and its members stating that original understanding is the proper foundation for adjudicating claims under the Establishment Clause. See, *e.g.*, *Town of Greece*, 572 U.S. at 602 (Alito, J., concurring) ("This Court has always purported to base its Establishment Clause decisions on the original meaning of that provision."); *Lynch*, 465 U.S. at 673 (interpreting the clause to "compor[t] with what history reveals was the contemporaneous understanding of its guarantees"); *Marsh* v. *Chambers*, 463 U.S. 783, 790 (1983) ("[H]istorical evidence sheds light not only on what the draftsmen intended the Establishment Clause to mean, but also on how they thought that Clause applied."); *Schempp*, 374 U.S. at 294 (Brennan, J., concurring) ("[T]he line

we must draw between the permissible and the impermissible is one which accords with history and faithfully reflects the understanding of the founding Fathers.").

2. The methodology employed in *Hosanna-Tabor* and *Town of Greece* is also capable of resolving any Establishment Clause controversies that may come before this Court or other courts. The original public meaning of the Establishment Clause is a limitation on the delegated authority of Congress (and by extension any government) to enact laws "respecting an establishment of religion." See Esbeck, *Uses and Abuses*, at 600. That prohibition means at least that a government may not set up a national (or state) church or interfere with the ecclesiastical affairs of religious organizations. See *Hosanna-Tabor*, 565 U.S. at 183 ("Familiar with life under the established Church of England, the founding generation sought to foreclose the possibility of a national church."); see also *id.* at 190 ("The present case, in contrast, concerns government interference with an internal church decision that affects the faith and mission of the church itself."). The Establishment Clause further condemns laws that adopt any of the legal attributes of a religious establishment as understood by the Framers. See *Schempp*, 374 U.S. at 294 (Brennan, J., concurring).

As explained above, scholars and historians have identified at least seven legal attributes of a religious establishment. Unless a law or modern government action possesses at least one of those specific attributes—or some other element of a religious establishment that the founding generation also condemned—*Hosanna-Tabor* and *Town of Greece* establish at least a strong presumption that the Establishment Clause is not violated.

That is certainly true if the government action at issue is, like the legislative prayer in *Town of Greece*, the very kind of government action that was viewed as constitutionally unproblematic before, during and shortly after the ratification of the First Amendment. A proper judicial test under the Establishment Clause "must acknowledge a practice that was accepted by the Framers and has withstood the critical scrutiny of time and political change." *Town of Greece*, 572 U.S. at 577.

3. For all these reasons, *Amici* submit that the test under the Establishment Clause should be this: With one exception, *government action does not violate the Establishment Clause unless history confirms that the founding generation understood that action as an establishment of religion outright or as a legal attribute of a religious establishment.* This test is true to the Clause's text and history. And it faithfully implements (but does not go beyond) both of the prohibitions contained in its text: a prohibition of any outright "establishment of religion," and a prohibition of laws "respecting" such an establishment.

The only exception should be when a long-standing precedent definitively and consistently resolves a particular issue. See, *e.g.*, *Citizens United* v. *Federal Election Comm'n*, 558 U.S. 310, 378 (2010) (Roberts, C.J., concurring) (stare decisis sometimes requires weighing "the importance of having constitutional questions *decided* against the importance of having them *decided right*.") In all other cases, profound doctrinal uncertainty in this Court's Establishment Clause jurisprudence, combined with perpetual efforts to exploit that uncertainty to leverage minor grievances

into excuses to marginalize religion and religious people in public settings, call for a return to the original meaning of that Clause.

B. Applying the test proposed here would protect religious freedom and avoid the errors of extreme separationism.

A judicial test focused on the historical meaning of "respecting an establishment of religion" readily sorts out false claims. In so doing, and perhaps most importantly, that test would prevent the Establishment Clause from facilitating hostility toward public acknowledgments of religious faith. Extreme strict separationism—the idea that there must be strict separation between the state and *religion* as well as the church itself—are responsible for severely undermining religious freedom. As Professor Hamburger puts it:

> [O]n the basis of this principle, many Americans question the right of others to bring their distinct religious views to bear on politics, and some courts limit the rights of religious organizations to receive government benefits distributed on entirely secular grounds. *** It even has discriminated among religions, for it has placed especially severe limitations upon persons whose religion is that of a "church" or religious group rather than a mere individual religiosity. *In all of these ways, the First Amendment, which was written to limit government, has been interpreted directly to constrain religion.*

Philip Hamburger, Separation of Church and State 484 (2002) (emphasis added).

The test proposed above offers a way out of this morass—one that faithfully reflects the Establishment Clause's text and history while protecting the religious pluralism that is a defining characteristic of our Nation. As an ever-expanding administrative state intrudes into more of American life, hewing to this original understanding will provide an important protection for religious freedom, both for individuals and for religious institutions.

C. Measured by the correct standard, the Bladensburg Cross is not remotely a "law respecting an establishment of religion."

The test proposed above makes this case easy. Given that there is no long-standing, definitive, and consistent precedent on point, the Bladensburg Cross is a violation of the Establishment Clause *only if* the Commission's ownership and maintenance of this war memorial on public land would have been understood as a government action "respecting an establishment of religion" in the founding period.

It would not have been so viewed because it does not fall into any of the categories identified in Section I.A. The only real question is whether the Commission's purchase of the Bladensburg Cross along with the adjoining land and its maintenance with tax revenues is the kind of financial support for religion that characterized religious establishments at the founding. The record shows that the American Legion is not even a church, much less an "establishment of religion." It is "a congressionally chartered veterans service organization," Pet. App. 37a (Gregory, J., dissenting), whose mere "affiliation with Christianity," *id.* 23a (Thacker, J.), cannot transform it into an object of constitutional suspicion. Accordingly, a war

memorial erected by a veterans association and shaped like a religious symbol cannot be considered a "law respecting an establishment of religion."

CONCLUSION

Concluding that a public memorial to the fallen of the Great War is unconstitutional merely because "[t]he Latin cross is a core symbol of Christianity," Pet. App. 3a, is the unfortunate end of legal reasoning mistakenly based on the ahistorical ideology of strict separationism—not the constitutionally mandated separation of church and state, but the wholly unauthorized effort to separate religion from public life. Because its maintenance on public land is not remotely the product of a "law respecting an establishment of religion," as that phrase was understood at the founding, the Bladensburg Cross does not offend the Establishment Clause.

A decision reversing the Fourth Circuit on that basis will promote religious freedom for both individuals and religious institutions.

Respectfully submitted,

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APPENDIX

APPENDIX: Interests of Individual *Amici*

The National Association of Evangelicals ("NAE") is the largest network of evangelical churches, denominations, colleges, and independent ministries in the United States. It serves 40 member denominations, as well as numerous evangelical associations, missions, nonprofits, colleges, seminaries and independent churches. NAE serves as the collective voice of evangelical churches, their religious ministries, and separately organized evangelical ministries. It believes that religious freedom is God-given and thereby unalienable, that it is a right prior to the state that is recognized in and protected by the First Amendment and other federal laws, and that the proper ordering of church-state relations places a restraint on governmental authority that safeguards the autonomy of religious organizations. NAE believes that civil government has a high duty to protect the religious freedom of peoples of all faiths.

The Church of Jesus Christ of Latter-day Saints is a Christian denomination with over 16 million members worldwide. Religious liberty is a fundamental Church doctrine: "We claim the privilege of worshiping Almighty God according to the dictates of our own conscience, and allow all men the same privilege, let them worship how, where, or what they may." Article of Faith 11. Also, we believe that "governments ... are bound to enact laws for the protection of all citizens in the free exercise of their religious belief" and for the protection of the autonomy of religious organizations. Doctrine & Covenants 134:7, 9-10. This brief reflects the Church's support for the religious liberty of individuals and religious institutions.

The Ethics and Religious Liberty Commission ("ERLC") is the moral concerns and public policy entity of the Southern Baptist Convention ("SBC"), the nation's largest Protestant denomination, with over 46,000 churches and 15.2 million members. The ERLC is charged by the SBC with addressing public policy affecting such issues as religious liberty, marriage and family, the sanctity of human life, and ethics. Religious freedom is an indispensable, bedrock value for Southern Baptists. The Constitution's guarantee of freedom from governmental interference in matters of faith is a crucial protection upon which SBC members and adherents of other faith traditions depend as they follow the dictates of their conscience in the practice of their faith.

The Orthodox Church in America was established in the Aleutian Islands and Alaska in the 1790s as a missionary initiative of the Russian Orthodox Church. Today the Church is the religious home of thousands of Orthodox Christians worshiping in temples across the country, and was granted independence from the Russian Church in 1970. The Orthodox Church in America rejoices in the strong value of religious freedom which is one of the hallmarks of American democracy and it is committed to the effort to ensure full enjoyment of that fundamental freedom.

The Lutheran Church—Missouri Synod ("the Synod") in an international Lutheran denomination with more than 6,000 member congregations, 22,000 ordained and commissioned ministers, and 2 million baptized members throughout the United States. In addition to numerous Synodwide related entities, it has two seminaries, nine universities, the largest Protestant parochial school system in America, and

hundreds of recognized service organizations operating all manner of charitable nonprofit corporations throughout the country.

Nearly two centuries ago, those who would eventually form The Lutheran Church—Missouri Synod came to the United States seeking the religious freedom guaranteed in our nation's Constitution. The Synod treasures and fully supports religious liberty and the preservation of all First Amendment protections, including the Establishment Clause, as intended by America's Founding Fathers. Accordingly, the Synod believes the High Court should interpret the First Amendment in the manner set forth in this brief.

International Church of the Foursquare Gospel seeks to declare the unchanging ministry of Jesus Christ worldwide. To that end, the Foursquare Church has congregations in nearly 150 countries, totaling approximately eight million global members. The Church strongly supports an approach to the Establishment Clause that preserves and protects both individual and institutional religious freedom.

Christian Legal Society ("CLS") is an association of Christian attorneys, law students, and law professors, founded in 1963 and dedicated to the defense of religious freedom. Through its Center for Law and Religious Freedom, CLS works to protect all citizens' free exercise and free speech rights, both in this Court and Congress. The freedoms of religious exercise, expression, and association are essential to a free society. Our Republic will prosper only if the First Amendment rights of all Americans are protected, regardless of the current popularity of their religious exercise and expression. For that reason, CLS was instrumental in

passage of landmark federal legislation to protect persons of all faiths, including: 1) the Equal Access Act of 1984, 98 Stat. 1302, 20 U.S.C. § 4071 *et seq.*, which protects the right of all students to meet for "religious, political, philosophical or other" speech on public secondary school campuses; 2) the Religious Freedom Restoration Act of 1993, 107 Stat. 1488, 42 U.S.C. § 2000bb *et seq.*, which protects the religious freedom of persons of all faiths; and 3) the Religious Land Use and Institutionalized Persons Act of 2000, 114 Stat. 803, 42 U.S.C. § 2000cc *et seq.*, which protects religious freedom for congregations and institutionalized persons of all faiths